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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

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## No. 320

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UNITED STATES GYPSUM COMPANY,

*Petitioner,*

*vs.*

PRENTISS M. BROWN, PRICE ADMINISTRATOR.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.**

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# INDEX.

## Subject Index.


| | Page |
|---|---|
| Petition for writ of certiorari | 1 |
| Opinions below | 2 |
| Jurisdiction | 2 |
| Statement | 2 |
| Questions presented | 9 |
| Reasons for granting the writ | 9 |


## Table of Cases Cited.


| | |
|---|---|
| *Florida* v. *United States*, 282 U. S. 194 | 11, 14 |
| *Morgan* v. *United States*, 298 U. S. 468 | 10 |
| *Nyles Salt Co.* v. *Board of Commissioners*, 239 U. S. 478 | 10 |
| *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 | 10 |
| *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 | 10 |
| *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55 | 10 |
| *Wichita R. R.* v. *Public Utilities Commission of Lamsas*, 260 U. S. 48 | 10 |
| *Yick Wo* v. *Hopkins*, 118 U. S. 356 | 10 |
| *United States* v. *B. & O. R. R.*, 293 U. S. 454 | 11 |
| *United States* v. *C. M. St. P. Ry. Co.*, 294 U. S. 499 | 11, 14 |


## Statutes Cited.


| | |
|---|---|
| Emergency Price Control Act of 1942 (Public Law 421, 77th Congress approved January 30, 1942) | 2 |
| Judicial Code, Sec. 240 (28 U. S. C. 347) | 2 |
| Revenue Act of 1942, Section 620 | 2 |


## Regulations.


| | |
|---|---|
| General Maximum Price Regulation, 7 F. R. 3153 | 1 |
| Maximum Price Regulation No. 188, 7 F. R. 5872 | 1 |
| Supplementary Order No. 31, 7 F. R. 9894 | 1 |
| Amendment No. 39, 7 F. R. 10454 | 2 |

## Other Authorities Cited.


| | Page |
|---|---|
| Ex parte 148, 248 I. C. C. 545 | 8 |
| 87 Cong. Rec. 9096 | 14 |
| 87 Cong. Rec. 9121 | 15 |
| 87 Cong. Rec. 9305 | 15 |
| 88 Cong. Rec. 69 | 18 |
| H. R. 5479 (H. R. 5990) | 14 |
| H. R. 5760, 5997, and 6086 (Cong. Rec., November 26, 1941) | 14 |
| House Hearings, 102, 833-848, 852-855, 862-865, 867--874, 1117 | 15 |

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PRENTISS M. BROWN, PRICE ADMINISTRATOR.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

*To the Honorable Justices of the Supreme Court of the United States:*

Your petitioner respectfully prays for a writ of certiorari to review the judgment and decree of the United States Emergency Court of Appeals dismissing a complaint of the petitioner which prayed a decree of injunction against the enforcement of General Maximum Price Regulation[1] and Maximum Price Regulation No. 188[2] as supplemented and amended by Supplementary Order No. 31[3] and Amend-

[1] 7 F. R. 3153
[2] 7 F. R. 5872
[3] 7 F. R. 9894

ment No. 39[4] in so far as they require petitioner to reduce its prices in certain zones by absorbing the Transportation Tax (Section 620, Revenue Act of 1942).

## Opinions Below.

The Price Administrator's decision denying petitioner's protest is not officially reported, but is found at pages 52-61 of the record. The opinion of the court below is not yet in the official reports but appears in the record, pages 125-130.

## Jurisdiction.

The judgment of the Emergency Court of Appeals was entered August 5, 1943. Jurisdiction is invoked under Section 204 (d) of the Emergency Price Control Act of 1942 (Public Law 421, 77th Congress, approved January 30, 1942). Jurisdiction is also invoked under Section 240 of the Judicial Code, as amended (U. S. C., 1934 Ed., Title 28, Sec. 347).

## Statement.

Petitioner manufactures and sells gypsum products, such as wall plasters, wall boards, laths and sheathing boards, which are used in the construction of various parts of building structures. Petitioner and others in the industry generally sell these products to building material dealers throughout the country, who in turn resell them to building contractors for incorporation into building structures (R. —).

This case invloves the prices at which petitioner sells the products of its Midland, California plant in certain zones in the states of California, Arizona and Utah (R. —).

Petitioner's customary method of pricing is f. o. b. plant. But in several zones in California, Arizona and Nevada it

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[4] 7 F. R. 10454

sells its products at zone delivered prices.[5] Gypsum plaster is sold in the metropolitan area of Los Angeles at a zone delivered price and elsewhere in these states it is sold at the f. o. b. plant price. Gypsum wallboard and gypsum sheathing board are sold at a zone delivered price in three different zones, i. e., the State of California, the State of Arizona, and the territory surrounding Reno, Nevada—elsewhere f. o. b. plant prices apply. Gypsum lath is sold at delivered prices in four different zones, i. e., Southern California, Northern California, Arizona and the territory surrounding Reno, Nevada—elsewhere at the f. o. b. plant prices (R. 44-45). It is the prices in these delivered price zones that are involved in this case.

Whether the products are sold at zone delivered prices or at f. o. b. plant prices, the customer pays the rail freight to the railroad (R. 45). Under petitioner's contract and order forms, delivery to the carrier is delivery to the customer. The bills of lading consign the products to the customer, not the seller. The buyer not only pays the freight to the carrier, but has to do so to get the shipment.

In the case of sales in delivered price zones, the invoices show the total delivered prices, then show the actual freight to destination which the customer pays to the carrier, and, as the third and final item, show the difference between the delivered price and the freight, which is the amount the customer pays petitioner for the products (R. 47).

The prices of gypsum products throughout the country have been decreasing for the last five years—long before the Emergency Price Control Act was passed. The prices

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[5] Before the Administrator and also in the court below, question arose whether the prices in these zones were in fact delivered prices or varying f.o.b. plant prices less than the full f.o.b. plant price. The Administrator and the court below found them to be zone delivered prices and for this purpose they will be treated as zone delivered prices.

of gypsum products to customers in these delivered price zones have not increased for five (5) years. Petitioner has not contemplated or asked any increases in prices of gypsum products in these delivered price zones or, in fact, elsewhere (R. 46).

Competitive plants also serving the states of California, Utah and Arizona sell their gypsum products on the same basis as petitioner. They sell at delivered zone prices in the same zones as petitioner and elsewhere charge f. o. b. plant prices (R. 46).

Although the Emergency Price Control Act became effective January 30, 1942, gypsum products were not under price control until April 28, 1942, when the Price Administrator issued General Maximum Price Regulation, which froze prices of all commodities not theretofore covered by a specific regulation. Under that regulation petitioner and other gypsum manufacturers were forbidden to sell and their customers were forbidden to purchase, at prices higher than the highest price charged by the individual seller (manufacturer) during March, 1942 (R. 62-67).

On July 29, 1942 the Price Administrator issued Maximum Price Regulation No. 188, which superseded General Maximum Price Regulation with respect to sales by manufacturers of a large number of commodities, including the gypsum products involved here. However, this regulation, like General Maximum Price Regulation, established maximum prices for articles sold during March, 1942, at the highest price charged by each individual seller during that month, and various sections of the General Maximum Price Regulation became applicable to Regulation No. 188 by reference (R. 98-109).

One of the sections of General Maximum Price Regulation which became part of Regulation No. 188 was Section 1499.7, which provided that any seller subject to a new tax

or increase in tax, might pass it on to his buyer. This section said:

> "If the statute or ordinance imposing such tax or increase does not prohibit the seller from stating and collecting the tax or increase separately from the purchase price, and the seller does separately state it, the seller may collect, in addition to the maximum price, the amount of the tax or increase actually paid by him or an amount equal to the amount of the tax paid by any prior vendor and separately stated and collected from the seller by the vendor from whom he purchased."

Neither this section of General Maximum Price Regulation nor any other section of the two regulations involved, required petitioner or any other seller of gypsum products to absorb such new taxes or permitted any purchaser to roll back taxes which he paid onto his seller (R. 70).

This was the situation up to December 1, 1942.

The Revenue Act of 1942 (Section 620) imposed a tax of 3% on the transportation of goods for hire, payable by the person paying for the transportation. The pertinent sections of the Revenue Act are:

> "(a) Tax. There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under this section. * * *

> "(c) Returns and Payment. The tax imposed by this section shall be paid by the person making the payment subject to the tax. * * *"

Petitioner's customers in these delivered zones, being the persons who pay the carrier for the transportation, were compelled to and have, since December 1, 1942, paid a tax equal to 3% of the freight bill which they paid, such payments being made to the carrier as the collection agency for the Treasury (R. 49-50).

On November 26th, the Price Administrator issued Supplementary Order No. 31, which provided that, under all maximum price regulations not specifically exempted from its provisions, the transportation tax should "be treated" as though it were an increase of 3% in the amount charged by every person engaged in the business of transporting property for hire (R. 112-114). This Supplementary Order No. 31 reads as follows:

> "Section 1305.36. Treatment of the tax on transportation of property imposed by the Revenue Act of 1942. —(a) Notwithstanding the provisions of any price regulation, the tax on the transportation of all property (excepting coal) imposed by section 620 of the Revenue Act of 1942 shall, for purposes of determining the applicable maximum price of any commodity or service, be treated as though it were an increase of 3% in the amount charged by every person engaged in the business of transporting property for hire. It shall not be treated, under any provision of any price regulation or any interpretation thereof, as a tax for which a charge may be made in addition to the maximum price."

There followed a list of regulations which were not affected by this ruling. On December 11th, the Price Administrator issued Amendment No. 39 to General Maximum Price Regu-

lation, specifically incorporating the terms of Supplementary Order No. 31 (R. 71).

This supplementary order and amendment appear merely to require that the person who pays for the transportation (in this case, petitioner's customers) must bear the tax and may not pass it back to his supplier or pass it on to his purchasers. But the statement of considerations accompanying this order stated that:

> "This will mean that where the price regulation establishes the maximum price on a delivered price basis which remains consistent despite variations in transportation cost, the seller will be required to absorb the tax. On the other hand, if the maximum price is established on a f.o.b. shipping point basis, the buyer will absorb the tax (R. 115-116).

In this statement of considerations the Price Administrator gives his reason for issuing the order and regulation as follows:

> "Because of the uncertainty that would be introduced into price regulations if each individual seller was to determine whether he would state the tax separately and add it to the maximum price, uniform action by this Office has been deemed necessary. Since the tax is fairly small in amount, its impact under Supplementary Order No. 31 will, in most cases, place no undue burden on the person required to absorb it. Therefore, in the opinion of the Administrator, Supplementary Order No. 31 will be generally fair and equitable and will effectuate the purposes of the Emergency Price Control Act of 1942, as amended, and the Executive Order of October 3, 1942, in the case of all commodities except those which have been specifically exempted" (R. 116).

The Price Administrator having determined that petitioner's prices in these zones were delivered prices, the

effect of the order, as explained by the accompanying statement of considerations, was to require petitioner to absorb its customers' transportation tax and, by the amount of the tax, to reduce its prices. For example: The zone delivered price of wallboard to a customer in San Francisco is $25.00 per M sq. ft., and the freight is 25¢ per cwt. Previous to this supplementary order and amendment petitioner's billing for a carload would have shown:

| | |
|---|---|
| 36,000 sq. ft. 3/8" wallboard at $25.00 | $900.00 |
| Freight (25¢ per cwt.) | 144.00 |
| | $756.00. |

But, under the supplementary order and amendment, petitioner must absorb 3% of $144.00, or $4.32, and reduce its price of $900.00 to $895.68, or reduce the net amount paid to $751.68. Whichever is done, the price is reduced (R. 50).

On December 17, 1942 petitioner filed with the Price Administrator a protest attacking these regulations, as supplemented and amended, in so far as they required petitioner to reduce its zone delivered prices by the 3% transportation tax.[6]

The protest was denied by the Price Administrator on February 6, 1943, and on March 9th the petitioner filed its complaint with the Emergency Court of Appeals (R. 51, 1).

This controversy relates to the validity of the regulations and orders of the Price Administrator requiring petitioner to reduce its prices in these delivered price zones by absorbing the 3% transportation tax payable, and paid,

[6] The protest filed with the Price Administrator also charged that the 6% freight increase previously ordered by the Interstate Commerce Commission (Ex parte 148, 248 I. C. C. 545) could not legally be rolled back to petitioner. This ground of protest was dropped from the Complaint before the Emergency Court of Appeals and is not before the court here. The 6% freight increase was suspended by order of the Interstate Commerce Commission issued April 6, 1943.

by its customers; and the judgment of the court below dismissing petitioner's complaint asking that the regulations, as supplemented and amended, be enjoined to this extent.

**Questions Presented.**

1. Are Supplementary Order No. 31 and Amendment No. 39 reasonably caculated to effectuate the purposes of the Act so as to make them valid regulations under the Emergency Price Control Act of 1942? Or are they issued for the purpose of securing uniformity in business practices—not one of the purposes and objectives of the Act?

2. Does the action of the Price Administrator in requiring a reduction of prices by absorption of transportation tax exceed the purposes of the Act?

3. Do the standards and directions of the Act, taken in connection with the purposes of the Act, give the Administrator any right to reduce prices which have not risen nor threatened to rise for five years—long before the Act was passed?

4. Can the Price Administrator reduce the level of prices found to exist between October 1-15, 1941 where the level of prices between those dates was representative and not affected by abnormal or seasonal conditions?

5. Can these regulations, as supplemented and amended, be said to have general applicability and effect when some manufacturers are required to absorb the transportation tax by reducing their prices and others are not, depending upon whether or not the Price Administrator concludes that the method of pricing is delivered or f.o.b. plant?

**Reasons for Granting the Writ.**

The court should grant certiorari herein because the questions raised in this petition are of nationwide interest in the proper and orderly administration of the Price Con-

trol Act. Furthermore, the Price Administrator, in the exercise of his powers under the Act, has departed from the principles repeatedly announced by this court with respect to orders of administrative agencies. It is apparent, we submit, that the Price Administrator has failed to follow the standards and directions of Congress.

The proper application of the standards fixed by Congress in connection with the purposes of the Act has never been before this Court, and a determination of the extent of the Price Administrator's power, as limited and defined by the purposes and standards of the Act, is of general importance to all sellers of commodities subject to the regulations of the Price Administrator under the Price Control Act.

Clearly, no order or regulation of an administrative agency is valid unless it is directed to a fulfillment of the purposes of the Act and reasonably calculated to effectuate those purposes. (*Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Thompson* v. *Consolidated Gas Co.,* 300 U. S. 55 (1937); *Nyles Salt Co.* v. *Board of Commissioners,* 239 U. S. 478 (1916).) Furthermore, this Court has repeatedly held that in delegating powers to adminstrative agencies, Congress must set forth the standards to be followed by the administrative agency, and those standards are necessary to the validity of the Act. (*Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935); *Schechter Poultry Corp.* v. *U. S.,* 295 U. S. 495 (1935).) Failure of the Administrator to observe and apply the standards and directions fixed by Congress renders his regulations and orders invalid. (*Morgan* v. *U. S.,* 298 U. S. 468 (1936); *Wichita R. R.* v. *Public Utilities Commission of Kansas,* 260 U. S. 48 (1922).) And it is not enough that the administrative agency makes findings or issues statements of consideration purporting to justify his regulations or orders if, by real application of the standards, he has no power to make the particular regulation or order.

(*U. S.* v. *C. M. St. P. & P. Ry. Co., et al.*, 294 U. S. 499 (1935); *U. S.* v. *B & O R. R.*, 293 U. S. 454, 462 (1935); *Florida* v. *U. S.*, 282 U. S. 194, 212 (1931).)

The court below disposed of the questions in this case by saying:

> "Without considering under what circumstances the Administrator may reduce prices, it is clear to us that he has not done so in this case. For, as we have already shown, complainant's maximum prices in the areas in question are its uniform delivered cost figures. These it is not directed to reduce but merely to maintain intact without increase by reason of the transportation tax."

But the court should have considered the circumstances under which the Price Administrator may reduce prices. It is no answer to say that the method of pricing is a "delivered price" as distinguished from an "f.o.b. plant price" and that any increase in freight rate would have to be absorbed by petitioner. This we do not admit, but even so, it is not apparent from the opinion just how that settles the question with respect to the transportation tax. It is sufficient to point out that the transportation tax is not freight—it is a tax imposed by the Revenue Act of 1942, and the fact that the measure of the tax is 3% of the freight bill does not make the tax additional freight paid the railroad for hauling the commodity. The court below misconceived the distinction between a tax and a freight bill paid as consideration for the transportation. The plain fact is that the regulations, as supplemented and amended, require a reduction of petitioner's prices, and the case cannot be decided without consideration of the circumstances under which the Price Administrator may reduce prices and the extent to which he may reduce them.

As to the first question, whether or not the order and amendment are reasonably calculated to effectuate the pur-

poses of the Act or were issued to accomplish purposes not within the purview of the Act, we think it clear that the Price Administrator exceeded his power.

The purposes of this Act were clearly to prevent price inflation and the consequences thereof. The Act is entitled:

> "An Act to further the national defense and security by checking speculative and excessive price rises, price dislocations, and inflationary tendencies, and for other purposes."

The purposes of the Act are set forth in Section 1 (a) of the Act as follows:

> "To stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents;
>
> To eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency;
>
> To assure that defense appropriations are not dissipated by excessive prices;
>
> To protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living;
>
> To prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices;
>
> To assist in securing adequate production of commodities and facilities;
>
> To prevent a post emergency collapse of values;
>
> To stabilize agricultural prices in the manner provided in section 3."

The order and amendment with respect to the transportation tax have no relation to the accomplishment of those purposes. The real reason for the issuance of them was set forth in the statement of considerations to be:

> "Because of the uncertainty that would be introduced into price regulations if each individual seller was to determine whether he would state the tax separately and add it to the maximum price, uniform action by this Office has been deemed necessary. Since the tax is fairly small in amount, its impact under Supplementary Order No. 31 will, in most cases, place no undue burden on the person required to absorb it" (R. 116).

The statement then concludes that the order will be generally fair and effectuate the purposes of the Act. The same reason is given in the statement of considerations accompanying Amendment No. 39.

Nothing is said about inflation or the effect of the tax on the control of inflation. Nor does the Price Administrator claim that the transportation tax is different in its effect on inflation than any other taxes covered by Section 1499.7 of General Maximum Price Regulation, which the taxpayer may require his customer to pay if separately stated on the invoice, and which apparently cause no inflation even if passed on by the taxpayer to his customers, regardless of amount.

He does not claim that non-uniformity would create price inflation, but rather confusion, and who is going to be confused is not apparent when the invoice must show the tax separately stated.

The real reason for the issuance of the order must be taken to be the one given in the statement of considerations —that the Price Administrator considered it desirable to have uniformity of business practices with respect to treatment of the tax by sellers—it would avoid uncertainty. The

reason given by the Price Administrator for his supplementary order and his amendment shows, without more, that they were not directed to carrying out the purposes of the Act.

It takes more than a conclusion of an administrative officer to validate an order and, if the order is not clearly directed toward accomplishing the purposes of the Act, the order must fall. (*Florida* v. *U. S.*, 282 U. S. 194, 213 (1931); *U. S.* v. *C. M. St. P. & P. Ry. Co.*, 294 U. S. 499, 506-7, 510-11 (1935).)

As to the second question raised, whether or not, in requiring a reduction in prices, the Price Administrator exceeded the purposes of the Act, the Act is an anti-price-inflation Act.

The objects and purposes of the Act make clear that Congress was not giving the Price Administrator the right to fix maximum prices generally or at any level he chose, but only to fix maximum prices when and to the extent necessary to prevent prices of commodities from becoming inflationary. The legislative history of the Act confirms this beyond all doubt.[7]

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[7] In the fall of 1941 there were two types of anti-inflation bills before Congress. One was the "Baruch Plan" (H. R. 5760, H. R. 5997, H. R. 6086), which contemplated overall freezing of prices and was defeated in the House by a vote of 218 to 63 (Cong. Rec., Nov. 26, 1941.) The other plan (H. R. 5479, which became H. R. 5990 in committee), and the one which finally was enacted into the Emergency Price Control Act of 1942, provided for price control on a selective basis of commodities the prices of which had become inflationary. The debate in Committee and on the floor show that Congress intended to pass a selective act.

Rep. Clyde Williams, of Missouri, a member of the House Committee on Banking and Currency, stated on the floor of the House (87 Cong. Rec. 9096):

> "The committee bill before the House is a selective price control bill. It is a bill which permits the Administrator, when any of these prices get out of line, when they rise above or far above the normal level, to take charge of them and hold them in line, not to permit them to go up to the sky. That is the difference between the two plans.

The zone delivered prices of petitioner and other gypsum manufacturers have not risen for five years. No claim is made or could be made, that they are excessive, abnormal or inflationary.

Nevertheless, the Price Administrator, under the guise of controlling inflation, orders petitioner and other gypsum manufacturers to reduce their prices in these zones. If the Act contained no other direction or standards to be followed by the Price Administrator, the title of the Act and the statement of its purposes is enough to invalidate the Price Administrator's orders to reduce prices that are normal and are not even claimed to be excessive, abnormal or inflationary.

As to questions 3 and 4—whether or not the Price Administrator followed the standards of the Act in requiring this reduction in price, we think it clear that he ignored the standards. Congress specifically provided the circumstances under which maximum prices might be fixed, the standards to be followed in fixing maximum prices, and even fixed the dates within which the level of prices was to be considered normal and non-inflationary.

Section 2 (a) of the Act provides:

> "Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with

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If these commodities that are now below the level rise to a point where they get out of line, then will be the time for the Administrator to take charge of them and keep them and hold them in line."

See also statements of Leon Henderson before the House Committee on Banking and Currency (House Hearings, 102, 833-848, 852-855, 862-865, 867-874, 1117); Rep. Thomas Rolph, of California, a member of the House Committee on Banking and Currency, at 87 Cong. Rec. 9121; Rep. Steagall, of Alabama, Chairman of the House Committee on Banking and Currency, at 87 Cong. Rec. 9305; and Rep. Albert Gore, of Tennessee, at 87 Cong. Rec. 9318.

the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941."

Under this section of the Act the Price Administrator only has power to fix maximum prices for commodities that have risen or threatened to rise in a manner inconsistent with the purposes of the Act. The purposes of the Act being to prevent abnormal, excessive and inflationary prices, commodities whose prices are fixed must have become or threatened to become abnormal, excessive or inflationary. And, if the commodities in question meet this test, the Price Administrator may fix such maximum prices "as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act."

We may assume, for this purpose, that if prices of certain commodities have become excessive, abnormal or inflationary—inconsistent with the purposes of the Act—the Price

Administrator has the right to reduce them to normal levels—levels that will effectuate the purposes of the Act. But the prices of commodities which have merely threatened to become inflationary and have not actually done so, cannot be reduced because they already effectuate the purposes of the Act. The most the Price Administrator can claim the right to do its to freeze them at their existing levels. The Administrator's power to fix maximum prices and the level at which he fixes them is definitely tied to the purpose of the Act. This being so, there is a clear distinction between his powers with regard to prices that have become inflationary and his powers with regard to prices that have not become inflationary but have merely threatened to become so. He cannot reduce prices that stand at normal levels—prices that are already consistent with the purposes of the Act.

General Maximum Price Regulation and Maximum Price Regulation No. 188 were issued on the basis that the prices of all commodities were at that time threatening to rise to an extent inconsistent with the purposes of the Act. Assuming that the Administrator had the power to include in one regulation thousands of commodities without separate study of the question whether each of them had actually threatened to become inflationary, and to include gypsum products therein because of some general overall threat, still it must be assumed that these prices had not actually become inflationary and that the purpose of the Act was effectuated by freezing them at their then levels. Without this assumption, it is questionable whether or not General Maximum Price Regulation and Maximum Price Regulation No. 188 could be sustained as valid regulations.

Congress went even further. It provided that the prices between October 1-15, 1941 should be considered at normal levels, unless prices between those dates were not representative because of abnormal or seasonal conditions, and

then the Administrator should consider the prices as normal during the nearest two-week period when they were representative. In so providing, Congress supplied a standard of normal prices which the Price Administrator is bound to follow.[8]

True, Congress provided that the Administrator might make adjustments for relevant factors of general applicability, including speculative fluctuations, general increases or decreases in cost of production, distribution and transportation, and general increases or decreases in profits earned by the sellers of the commodity or commodities during and subsequent to the year ended October 1, 1941. The Administrator does not claim that there are, nor are there, in fact, any such relevant factors of general applicability warranting a reduction in prices in this case. If the Price Administrator had inquired into the factors of general applicability in the gypsum industry, he would undoubtedly have found that those factors gave basis for raising rather than lowering prices—that there were no speculative fluctu-

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[8] See 88 Cong. Rec., page 69, where Senator Brown (now Price Administrator) said:

> "It would establish as a base date prices for commodities as of the period from October 1, to October 15, 1941. Let me repeat that in a slightly different way, because it is one of the fundamental things in the bill. It is the standard that is laid down, and one of the principal guides to the limitations upon the Price Administrator. In general, the bill would endeavor to hold the general level of prices to the level which existed during the period from October 1 to October 15, 1941. * * *The bill, if enacted into law, would leave untouched and unregulated prices within the jurisdiction of the Price Administrator if they remain at or below the level of prices during the period from October 1 to October 15, 1941."

and again, at page 88:

> "The bill requires the Administrator to adjust the prices upward for increased costs of production. As retailers generally replace goods on their shelves, their costs will increase. The bill directs the Administrator to take account of these increased costs in any ceilings he may have established."

ations, that costs had increased and profits had generally decreased.

Petitioner's prices, as well as its competitor's prices, in the delivered price zones involved herein, have not risen or threatened to rise since 1936 (R. 46). They meet the standard of normal prices fixed by the Act—the level of prices between October 1 and October 15, 1941. Petitioner has not contemplated nor does it now ask any increase in those price. Those prices stand today at levels established through competition unaffected by the war economy—no claim is made that they are excessive, abnormal or inflationary. No better test of prices effectuating the purposes of the Act can be found than prices that have not risen since 1936 and stand at normal levels.

Yet the Price Administrator, by his Supplementary Order No. 31 and Amendment No. 39, has reduced those prices below their normal levels. In doing so, he has failed to follow the standards and directions of Congress.

The Act does not contemplate that general increases in costs of a group of sellers (here the retail building material dealers) should be rolled back to their suppliers (here the gypsum manufacturers). Rather, it contemplates that general increases in costs of any group of sellers should be given consideration in determining the maximum prices of that group of sellers whose costs have increased. Section 2 (a) of the Act specifically directs the Price Administrator to make adjustments for general increases in costs in fixing the maximum prices of any group of sellers.

The court below made no distinction between increases in costs of the retail building material dealers by reason of their payment of the transportation tax, and increases in cost of the gypsum manufacturer. But the Act recognizes that fundamental distinction, and the proper procedure under these circumstances would have been for the Price Administrator to make such adjustments in the prices of

the retail building material dealers as might be found necessary. This he did not do, and one reason for not having done so may be found in his statement of considerations that the tax is small. The court below gave no consideration to the proper procedure to be followed under the Act in case of general increases in costs.

The fifth question concerns the requirement of the statute that the regulations be of general applicability and effect.

Section 2 (a) of the Act provides:

> "As used in the foregoing provisions of this subsection, the term 'regulation' means a regulation or order of general applicability and effect."

If Supplementary Order No. 31 and Amendment No. 39 had merely provided that the person who pays the tax must absorb it into his costs and may not pass it on or roll it back, we may assume that the general applicability and effect of the Act would not be destroyed.

But the order and amendment do not stop there but go on to provide, as the Administrator has specifically ruled in this case, that petitioner and other gypsum manufacturers selling in these delivered zones, must bear the tax by reducing their prices by an amount equivalent to the tax, even though they are not liable for and do not pay the tax.

In so holding the Administrator has placed petitioner and others similarly situated into a special class by requiring that, out of all persons subject to the order and amendment, these sellers, though not liable for the tax and not paying it must have it rolled back to them and their prices reduced, while other sellers do not have the tax rolled back to them.

No attempt has been made to show that the classification is reasonable. And we do not know how it could be claimed reasonable to order that some sellers must absorb their

customers' tax and reduce their prices merely because their method of pricing is a delivered price; but others, because they sell f. o. b. plant, do not have to absorb the tax.

While Section 2 (c) of the Act provides that the Price Administrator may make classifications and differentiations, he is limited to making those which are necessary or proper to effectuate the purposes of the Act—to prevent price inflation. But, if the transportation tax will cause inflation with respect to building material dealers buying on a delivered price, it is apparent that the same price inflation would occur with respect to dealers purchasing f. o. b. plant. While the Price Administrator has made a classification and differentiation, he has not made one which is directed toward effectuating the purposes of the Act. Whatever effect this tax might have on price inflation, it certainly cannot have a different effect depending upon whether buyers purchase at delivered prices or at f. o. b. plant prices.

The court below answers this contention, as it does all others with respect to this matter, by saying that, having held petitioner's prices to be delivered prices, the transportation tax must be considered part of the freight and included in the price. But we have already shown this is no answer to the question.

Petitioner respectfully submits that this petition for writ of certiorari should be granted for the reasons stated.

Respectfully submitted,

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